Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2004

DIANA VAZQUEZ-VALENTIN,
Petitioner

v.

VICTOR J. SANTIAGO-DIAZ, in his personal capacity and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, in her personal capacity and as Human Resources Director of the Municipality of Toa Baja,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the appellate court erred by not following the U.S. Supreme Court precedent in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), and vacating the jury verdict and directing the entry of judgment for the party that failed to make a motion under Federal Rule of Civil Procedure 50 (b) after the verdict.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Diana Vazquez-Valentin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The judgment of the Court of Appeals appears in Vazquez-Valentin v. Santiago-Diaz, No. 03-1949, slip op. (1st Cir. September 22, 2004) (Appendix 1a-52a).

JURISDICTION

The Court of Appeals entered its judgment on September 22, 2004. A Petition for Rehearing or for Rehearing En Banc was filed and the same were denied on November 17, 2004 (Appendix 53a-54a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute involved in this case is the Federal Rule of Civil Procedure 50 (b) which states, in its pertinent part:

"**Renewing Motion for Judgment After Trial: Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
    (A) allow the judgment to stand,
    (B) order a new trial, or
    (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned;
    (A) order a new trial, or

(B) direct entry of judgment as a matter of law."

STATEMENT

On May 14, 2002, after nine days of jury trial, the jury returned a verdict in favor of plaintiff Diana Vazquez-Valentin, petitioner herein, and against all defendants, respondents herein, for claims based on political discrimination and constructive discharge under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. On that same date the district court issued its judgment pursuant to the jury verdict, and the judgment was entered on docket on may 16, 2002.

Before submitting the case to the jury defendants moved for judgment as a matter of law under Rule 50 (a) of the Federal Rules of Civil Procedure, and the court denied the same on May 10, 2002; however, defendants did not renew the Rule 50 motion under Rule 50 (b) after the jury verdict.

On May 31, 2002, defendants filed a Federal Rule of Civil Procedure 59 motion requesting the court to set aside the

compensatory and punitive damages award; a remittitur of the damages warded at trial. On May 5, 2003, the district court issued a final judgment denying the Rule 59 motion, and stating that it had been a remittitur and not a motion for new trial.

Defendants appealed the case to the First Circuit Court of Appeals on November 3, 2003, raising, *inter alia,* the issue of the insufficiency of the evidence to withstand a motion as a matter of law, and after oral argument, on September 22, 2004, the appellate court issued a decision vacating the judgment of the district court and ordering it to enter judgment for the defendants. Appendix 1a-52a. The Court of Appeals stated in note 8 of its decision that although defendants failed to renew their motion under Rule 50 after the jury verdict, to preserve for appeal the district court's denial of said motion, nevertheless, it was invoking its authority to assess the sufficiency of the evidence in the case.

Plaintiff-appellee Vazquez-Valentin filed a petition for rehearing or for rehearing en banc citing this Honorable

Court's precedent in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), and in addition citing First Circuit political discrimination cases where similar evidence had been found to constitute First Amendment violations; however, the petition was denied on November 17, 2004. Appendix 53a-54a.

On January 27, 2005, the district court issued its final judgment pursuant to the Judgment of the First Circuit Court of Appeals. Appendix 55a.

REASONS FOR GRANTING THE PETITION

Petitioner requests form this Honorable Court to grant her petition for a writ of certiorari pursuant to Rule 10 (c) of the Rules of this Court, because there are special and important reasons, since the Court of Appeals for the First Circuit, contrary to decisions of this Court, reviewed the sufficiency of the evidence in the absence of a post-verdict Rule 50 (b) motion by defendants-appellants, for judgment as a matter of law, thus, ignoring this Honorable Court's precedent in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947).

Therefore, the First Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, which requires the exercise of the power of supervision by this Court.

In Halliday v. United States, 315 U.S. 94 (1941), like in Berry v. United States, 312 U.S. 492 (1941), this Court granted certiorari because of the importance of Rule 50 (b), even though it was not until Cone that it finally proceeded to deal specifically with Rule 50 (b), since in the earlier cases this Court had found that the evidence was sufficient to support the jury verdict.

This Honorable Court has upheld the basic tenet expressed in Cone: that the appellate court may not order judgment as a matter of law where the verdict loser has failed to comply strictly with Rule 50 (b). This principle has been followed or repeated, for example, in Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); in Fountain v. Filson, 336 U.S. 681 (1949); in Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 (1952); and in Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967).

Given this Court's consistency and efforts through the years in defining and clarifying the consequence in the appeal of a party's failure to file a Rule 50(b) motion for judgment as a matter of law, the First Circuit Court of Appeals' refusal to follow this Court's precedent should be addressed for the benefit of the Bench and Bar.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the petition for a writ of certiorari should be granted and the judgment below reversed.

RESPECTFULLY SUBMITTED.

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United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN
Plaintiff, Appellee,

v.

VICTOR J. SANTIAGO-DIAZ, Individually and as Mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGROS DELGADO-ORTIZ, Individually and as Human Resources Director of Toa Baja,

Defendants, Appellants.

APPEAL FORM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., Senior U.S. District Judge]

Before
Torruella, Lynch, and Lipez, Circuit Judges.

Carlos A. Del Valle Cruz, with whom Anabelle Rodriguez, Secretary of Justice, and Ivonne Palerm Cruz, Deputy Secretary for Litigation were on brief, for appellants in their individual capacities.

Roberto Ariel Fernández for appellants in their official capacities and the Municipality of Toa Baja.

Guillermo A. Macari-Grillo, with whom Jesus M. Hernandez-Sanchez was on brief, for appellee.

September 22, 2004

Lipez, Circuit Judge. Diana Vázquez-Valentín ("Vázquez") brought an action against defendants - - the Municipality of Toa Baja; its Mayor, Victor J. Santiago-Díaz ("Santiago"); and its Director of Human Resources, Milagros Delgado-Ortiz ("Delgado") - - pursuant to 42 U.S.C. § 1983 for demoting and constructively discharging her because of her political affiliation. Following the jury verdict awarding compensatory and punitive damages to Vázquez, defendants seek the entry of judgment on their behalf as a matter of law or, in the alternative, a new trial. In arguing for judgment as a matter of law, defendants aver that plaintiff did not introduce sufficient evidence for a jury to reasonably infer that defendants discriminated against Vázquez on the basis of her political affiliation. Such an argument rarely prevails after a favorable jury verdict. However, having reviewed the record with care, we agree that it prevails here. Accordingly, we vacate the verdict and direct entry of judgment for defendants.

I.

Drawing on the evidence presented at trial, we begin by describing the background of this case. Except where noted, this background information is undisputed.

A. The Change of Administration and Alteration of the Job Classification Plan

On November 7, 2000, general elections were held in Puerto Rico. In the municipality of Toa Baja, defendant Victor J. Santiago, the PDP candidate for mayor of Toa Baja, defeated the incumbent NPP candidate, Víctor Soto, who had been mayor for sixteen years. In total, the NPP had controlled the municipal

government of Toa Baja for twenty-four years prior to the 2000 election.

Upon taking office, the new administration apparently faced several challenges. Among them were issues related to personnel actions and human resources plans that were detailed in several documents, including an audit from the Comptroller of Puerto Rico, dated June 14, 2000; a letter form the Commonwealth's Central Office for the Administration of Personnel and Human Resources (known by its acronym "OCALARH," which is based on the Spanish version of the office's name); and another letter from the Office of the Commissioner for Municipal Affairs (similarly known as "OCAP").[1] These documents addressed

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[1] *The contents of these documents were not admitted below, over defendants' strenuous objections. The district court found that these documents were inadmissible as hearsay and informed the jury only that defendants sought advice about personnel actions and other issues, and that they received such advice form these agencies. The exclusion of these documents as hearsay is troubling. So crucial to the defendants' case, and offered as an explanation for the personnel actions undertaken by the defendants rather than for the truth of the personnel irregularities described in the documents, these documents are not hearsay, and they were highly relevant. Their exclusion might well have justified a new trial. However, we do*

personnel issues of the municipality. In Puerto Rico, all municipal jobs are governed by so-called job classification plans that are adopted locally. These plans set forth the occupational groups and personnel structure of the municipality, including the primary responsibilities and employment requirements for each position in city government. The salaries for various jobs are set forth in a separate salary scale that establishes the salary for each job by classification.

From time to time, municipalities revise their job classification plans. Toa Baja undertook this task in 1997, when it altered the then-existing job classification

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not have to decide that issue because of our disposition of the case on sufficiency of the evidence grounds. Because defendants made an offer of proof regarding these documents at trial, we may consider the excluded documents as part of the record on appeal for the purpose of describing the background of this case. United States v. McDaniel, 482 F. 2d 305, 311 (8th Cir. 1973); see also Wright and Graham, Federal Practice and Procedure: Evidence § 5040 91977) ("Documents and other exhibits are usually marked for identification and become part of the record on appeal, even if excluded.") We do not consider these excluded documents in conducting our sufficiency of the evidence analysis.

plan that had been adopted in 1991.[2] According to the Comptroller's report, the 1997, changes were not valid alterations to the 1991 plan because they were not first submitted for approval to OCALARH, and past municipal administrations had appointed several hundred employees in violation of the relevant state law and regulations. The report also recommend both that the municipality put in place a system for the selection and recruitment of personnel and that the administration develop a corrective action plan to remedy the various illegalities cited therein.[3]

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[2] *The parties bitterly dispute whether this alteration was in fact an altogether "new plan" of job classifications or simply an "amendment" to the existing 1991 job classification plan ("the 1991 plan"). The relevant ramifications of that distinction, as well as the approval process and the related municipal ordinances, are not germane to the sufficiency of the evidence claim, and we do not delve into them here.*

[3] *On August 2, 2004, the same district court that heard this case issued an Opinion and Order and Partial Judgment in a related case, Maria Alderondo Lugo v. Municipality of Toa Baja, Civil No. 02-1123 ("August 2 Opinion"). In Lugo, ninety-five employees and former employees of Toa Baja sued the city, Santiago, and Delgado, the latter two defendants in both their official and individual capacities, alleging politically discriminatory personnel actions. One group of plaintiffs alleged only political harassment. In the August 2 Opinion, the district court granted qualified immunity to Santiago and Delgado in their personal capacity, except with respect to the claim of the few plaintiffs alleging only political harassment. Relying on the*

Defendants then undertook a review of the personnel files of all 1,300 or so municipal employees. Defendants claim that they did so because, according to the Comptroller's report, "[n]ot addressing the recommendations of the audit... without just cause [] may constitute a violation [of]... the Government Ethics Act." Plaintiff maintains that the defendants sought to retaliate against members of the NPP. As of May 2002, at the time of the trial, around six hundred files had been evaluated, including Vázquez's. Of those, 281 employees had sought an informal hearing regarding the personnel action that resulted from the review.

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documentary evidence excluded in Vázquez's trial but admitted in Lugo, the district court held that

> *[d]efendants have shown with documentation and affidavits that they had legitimate reasons 9i) to believe that the 1997 Changes were a new plan 9including the view of governmental agencies) and (ii) for re-classifying Plaintiffs. Defendants have also shown that they did such re-classification in accordance with the law and at the instance of the Comptroller, a man appointed by the NPP former governor.*

August 2 opinion at 23.

B. Vázquez's Political Activity and Employment History

Vázquez has been active in the NPP since the age of eighteen. She was president of chair of the NPP committee in her ward (Barrio Pajaros in Toa Baja), and she worked on the mobilization committee, organized rallies, and raised funds. Additionally, she was one of the NPP's electoral college officers.

Her employment at the municipality of Toa Baja started in 1985, when Vázquez was employed in a transitory position[4] as an office clerk. On February 1, 1989, she became a career employee in the position of Office Worker/Typist I at a monthly salary of $545. On July 1, 1993, Vázquez was appointed to the position of Secretary III, with a monthly salary of $1019, at the request of David Córdova Torrech ("Córdova"), her immediate supervisor and head of the Office of Services to the Citizenry. Twenty days later, Córdova

[4] *Government employees in Puerto Rico are classified as "transitory" or "temporary," which essentially means the employment is at-will, or*

asked that Vázquez be reassigned again, this time to the position of Assistant Director of the newly created Levittown branch of the Office of Services to the Citizenry. That request was granted, and Vázquez assumed the position of Assistant Director on August 16, with a monthly salary of $1752.

In 1997, the alteration to the job classification plan eliminated the position of Assistant Director from the employment hierarchy. In the wake of that elimination, Vázquez was reassigned to the position of Executive Director II. Two years later, in 1999, Vázquez was appointed as an Administrative Assistant to Mayor Soto, a trust position within the administration. Following NPP's defeat at the polls in 2000, Vázquez was reassigned to her former position of Executive Director II.

C. Vázquez's Demotion

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as "carreer" or "permanent," which is the equivalent of having job tenure with attendants vested property rights.

On May 22, 2001, the defendants, Mayor Santiago and Director of Human Resources Delgado, held a meeting with in fifteen to eighteen employees, including Vázquez, to notify them that their classifications were being changed pursuant to the decision to declare the 1997 plan null and void and return to the 1991 classifications. According to Vázquez, Santiago explained at that meeting that the PDP had won the election and, in Vázquez's words, said that "they had to adopt actions with employees, that they had to clean house..." Santiago then explained that the affected employees had certain rights to administrative hearings and, again in Vázquez's words, "that whomever wished to go through attorneys, well, they then had to bear the consequences of their actions and that we would see each other in Court." Vázquez testified that Delgado then took the floor, saying that she agreed with Santiago; Delgado then explained the appeals process to the reclassified employees.

Following Delgado's explanation of the appeals process, the employees were handed letters describing their new classifications and explaining the reasons for the reclassifications. The letter to Vázquez stated that she lacked the academic preparation or experience for her current position and was being reassigned to Office Worker/Typist I, the position she held in 1989. According to the defendants' review of her personnel file, that was the last position to which Vázquez had validly been appointed.

Vázquez attended a hearing in front of an administrative hearing officer on September 9, 2001.[5] According to Vázquez, the hearing lasted approximately five minutes. In January 2002, the hearing officer issued a report and recommendation to the effect that Vázquez had been illegally hired and

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[5] *This hearing is apparently different than the hearing affected employees could seek before the Board of Appeals of the Personnel Administration System (which is known as "JASAP"). Vázquez was notified of her right to request an administrative hearing before JASAP to challenge the demotion, but she declined to seek such a*

promoted. Although Vázquez remained in the Executive Director II position at the monthly salary of $2083 pending the outcome of the hearing, she was officially reassigned to Office Worker/Typist I by letter of January 30, 2002. Her monthly salary was reduced accordingly to $900, effective February 1. on march 15, 2002, Vázquez tendered her resignation to Santiago, effective April 9. Vázquez's employment history with the municipality is summarized below, with appointment date or year, job title, and monthly salary where known.

- 1985: Office Clerk
- February 1, 1989: Office Worker/Typist I ($545 monthly salary)
- July 1, 1993: Secretary III ($1019 monthly salary)
- 1997: Executive Director II (change of title because of changes in the 1997 plan)
- May 1, 1999: Administrative Assistant (trust position)

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hearing because, in her opinion, the "hearing would be futile and a sham and would violate [her] right to a due process."

- January 10, 2001: Executive Director II ($2083 monthly salary)
- February 1, 2002: Office Worker/Typist I ($900 monthly salary)
- April 9, 2002: resignation effective

D. The Lawsuit

Vázquez brought this civil rights action pursuant to 42 U.S.C. § 1983 on June 13, 2001, against the municipality of Toa Baja, mayor Santiago, and Human Resources Director Delgado. Vázquez sued Santiago and Delgado in both their official and personal capacities. Vázquez alleged that she was demoted and constructively discharged, and that these adverse employment actions violated her First Amendment and due process rights under the United States Constitution. In her complaint, she sought compensatory and punitive damages, as well as reinstatement. The defendants denied the allegations and replied that Vázquez was illegally appointed to her position with the city and that they were obligated to correct the irregularity.

On March 27, 2002, prior to trial, the defendants moved for summary judgment, with Santiago and Delgado raising the affirmative defense of qualified immunity in their individual capacities. The district court denied the motion. A jury trial began on April 30, 2002. At the close of all evidence, defendants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, arguing that Vázquez did not produce sufficient evidence to show (1) that her due process rights were violated, (2) that her political affiliation was a substantial or motivating factor for her demotion, or (3) that she was constructively discharged. The district court granted defendants' Rule 50 motion as to due process claim but denied it in all other respects, including the qualified immunity defense.[6]

On May 14, the jury found for plaintiff, awarding her $275,000 in compensatory damages for mental and emotional pain and suffering, $6,828 in

[6] *Vázquez does not appeal the district court's ruling on her due*

compensatory damages for lost earnings, and $42,000 in punitive damages, for a total of $323,828, plus post-judgment interest, reasonable costs, and attorney's fees.[7] In light of the jury finding that the defendants discriminated against Vázquez on the basis of her political affiliation and the jury's award of punitive damages the district court rejected Santiago's and Delgado's affirmative defense of qualified immunity. The district court then denied defendants' post-trial Rule 59 motion, which asked the court to set aside the compensatory and punitive damages as excessive and without a sound evidentiary basis. The district court also ordered the defendants to reinstate Vázquez to her previous position of Executive Director II.

The defendants raise several arguments on appeal. First, they urge that the district court erred in

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process claim.

[7] The pain and suffering damages were apportioned among the defendants as follows: $178,750 from the municipality; $68,750 from Santiago; and $27,500 from Delgado. The lost earnings award was assessed jointly and severally against all defendants, and the

denying their Rule 50 motion as to the political discrimination claim.[8] Second, defendants argue that the district court erred in denying admissibility of the Comptroller's report and agency letters, which defendants maintain were crucial to substantiating that political discrimination was not a factor in Vázquez's reassignment. Third, defendants claim that the trial court made allegedly prejudicial remarks in front of the jury. Fourth, defendants assert that the district court erred in ordering plaintiff reinstated to her previously position of Executive Director II. Finally, in their individual capacity, defendants challenge the district

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punitive damages were assessed $30,000 to Santiago and $12,000 to Delgado.

[8] *Although defendants made a motion pursuant to Rule 50 (a0 before the case was submitted to the jury, they failed to renew that motion after the jury verdict. Ordinarily, that omission would mean that a party could not seek judgment as a matter of law on appeal. See Udemba v. Nicoli, 237 F. 3d 8, 13 (1st Cir. 2001) ("[T]o preserve for appeal the district court's rejection of a motion for judgment as a matter of law made at the close of the evidence, the movant must seasonably renew that motion post-verdict"). However, "even when a party has failed to make the proper motion below, this court retainst the authority to 'inquire whether the record reflects an absolute dearth of evidentiary support for the jury's verdict.' "Id. (quoting Faigin v. Kelly, 184 F. 3d 67, 76 91st Cir. 1999)). We invoke our authority to assess the sufficiency of the evidence here. We also*

court's denial of the qualified immunity defense. Because of our disposition of the sufficiency of the evidence claim, we do not reach defendants' other arguments.

II.

A. Standard of Review

The standard for setting aside a jury verdict pursuant to Federal Rule of Civil Procedure 50 (b0 is a stringent one: "[W]e must examine the evidence in the light most favorable to the plaintiff and determine whether there are facts and inferences reasonably drawn from those facts which lead to but one conclusion - - that there is a total failure of evidence to prove plaintiff's case." Mayo v. Schooner Capital Corp., 825 F. 2d 566, 568 91st Cir. 1987) (quotation and citation omitted). In reviewing the record, we will evaluate neither the credibility of the witnesses nor the weight of the evidence. Santiago-Negron v. Castro –Davila, 865 F. 2d 431, 445 (1st Cir. 1989). Even though we draw all rational inferences from the facts in

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note that plaintiff has failed to allege defendants' forfeiture of the

favor of plaintiff, "the plaintiff is not entitled to inferences based on speculation and conjecture." Ferrer v. Zayas, 914 F. 2d 309, 311, (1st Cir. 1990). A non-moving party who bears the burden of proof, as Vázquez does here, must have presented "more than a mere scintilla of evidence in its favor" to withstand a motion for judgment as a matter of law. Invest Almaz v. Temple-Inland Forest Prod. Corp., 243 F. 3d 57, 76 (1st Cir. 2001) (quotation and citation omitted). Additionally, we are not obligated to disregard uncontradicted evidence offered by defendants. Santiago-Negron, 865 F. 2d at 445.

B. Analysis of Political Discrimination Claims

A governmental employee who is not in a policy-making position of confidence and trust is shielded form adverse employment decisions because of the employee's political affiliation. Figueroa-Serrano v. Ramos-Alverio, 221 F. 3d 1,7 (1st Cir. 2000) (citing Branti v. Finkel, 445 U.S. 507, 517-19 (1980), and Rutan v. Republican Party of Illinois, 497

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sufficiency of the evidence issue.

U.S. 62, 75 (1990)). [9] When a plaintiff brings a political discrimination claim, she bears the burden of "producing sufficient direct or circumstantial evidence form which a jury reasonably may infer that plaintiff['s] constitutionally protected conduct - - in this case, political affiliation with the NPP - - was a 'substantial' or 'motivating' factor behind [her] dismissal." Acevedo-Diaz v. Aponte, 1 F. 3d 62, 66 (1st Cir. 1993); see also Figueroa-Serrano, 221 F. 3d at 7 (citing Mt. Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977)) ("To prevail on a free speech claim, a public employee must show that she engaged in constitutionally-protected conduct and that this conduct was a substantial factor in the adverse employment decision."). The plaintiff bears the burden of persuasion on these issues throughout the case.

The defendant, of course, may offer rebuttal evidence to attempt to disprove that political affiliation played a substantial role in the adverse employment action. Additionally, even if

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[9] *Although Vázquez held a trust position in the previous administration form may 1, 1999, to January 10, 2001, her removal from that position and restoration to Executive Director II are not at issue here.*

the plaintiff establishes that proposition by a preponderance of the evidence, the defendant may raise an affirmative defense: it may attempt to "prove by a preponderance of the evidence that plaintiff [] would have been dismissed regardless of [her] political affiliation." Acevedo-Diaz, 1 F. 3d at 66; see also Mt. Healthy, 429 U.S. at 287; Sanchez-Lopez v. Fuentes-Pujols, 375 F. 3d 121, 124 (1st Cir. 2004). In other words, even if the plaintiff has shown that her political affiliation was a substantial or motivating factor in the adverse employment decision, the defendant will not be held liable if it can persuade the fact finder that it would have taken the same course of action anyway, without regard to plaintiff's political affiliation. The Supreme Court has made clear that defendant's Mt. Healthy defense serves to prevent an employee who would have received an adverse employment decision based on legitimate reasons from being "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." Mt. Healthy, 429 U.S. at 285. However, if a plaintiff does not produce evidence

sufficient to allow a reasonable inference that political discrimination was a substantial or motivating factor in the challenged employment action, we need not analyze defendant's Mt. Healthy defense. Accordingly, we turn now to evaluating whether plaintiff produced sufficient evidence for a reasonable jury to find that her political affiliation was a substantial or motivating cause of her demotion and alleged constructive discharge.

C. The Evidence Adduced at Trial

We will reverse a jury verdict in a case such as this "only if: (1) the record evidence compelled the conclusion that the plaintiff would have been dismissed in any event for nondiscriminatory reasons [in other words, the Mt. Healthy defense prevails as a matter of law], or (2) the plaintiff did not introduce sufficient evidence in the first instance to shift the burden of persuasion to the defendants." Acevedo-Diaz, 1 F. 3d at 67. Here, we are presented with the rare case that requires reversing a jury verdict on appeal because plaintiff's evidence failed to establish that political discrimination was a

substantial or motivating factor in the challenged employment action. Because the court's dismissal of the due process claim was not appealed, we include in our analysis only testimony relevant to the First Amendment claim.

1. Plaintiff's Witnesses

Plaintiff offered testimony from four witnesses: (1) María Sánchez Coraliza ("Sánchez"), Assistant Director of the Human Resources Office and author of both the 1991 and 1997 job classification plans; (2) David Córdova Torrech ("Córdova"), now retired after fourteen years of municipal service that included serving as director of the Citizen's Office for the Mayor and as Vázquez's direct supervisor; (3) Linda E. Rivera Vega ("Rivera"), who was purchasing and procurement bids director for the municipality during six months relevant to this litigation; and (4) Vázquez herself.

a. Sánchez

Sánchez testified that when she became aware that Santiago was considering rescinding the 1997 plan and

restoring staffing in accordance with the 1991 plan, she told him "that I did not believe that he should take upon himself to do the action that he intended to do... since there were explanations for everything that had taken place and that could entail certain employees might sue him and that he might have to appear in court." According to Sánchez, Santiago replied that "if he had to go to court and the court assigned him to pay, that he would pay." Sánchez further testified that she advised him that "the 1997 plan had been approved by a municipality ordinance and that he should seek guidance in that sense.'

In answer to questions about how many employees were switched from career employee status to transitory employee status as a result of the Mayor's decision to rescind the 1997 plan, Sánchez could not give a numerical estimate. Instead, she mentioned some names of affected people whom she personally knew. After listing five people by name and saying that she "would have to mention a whole bunch of them because there were many," Sánchez testified that "all these people" belonged to the NPP.

Plaintiff also elicited testimony form Sánchez regarding Vázquez's qualifications for the positions to which she had been appointed. In sum, Sánchez testified that Vázquez was qualified for all the positions she had held at the municipality. However, Sánchez admitted on cross-examination that Commonwealth law requires, with some exceptions, that before a position is filled it must be posted or advertised; that the vacancy must be filled using a system called the "register of eligible' or some alternative equivalent system; that the hired personnel must serve a probationary period of three to six months; and that an employee may only become a career employee after satisfactorily completing the probationary period. Sánchez also testified on cross that the municipality had not followed these hiring procedures as a general matter.

b. Córdova

Córdova, director of the Citizen's Office for the Mayor and Vázquez's direct supervisor, testified to Vázquez's increasing responsibilities and growth as an employee during her tenure with him. During Vázquez's thirteen years under

Córdova, he made two written evaluations of her job performance. Additionally, Córdova explained that he petitioned the former mayor to appoint Vázquez as Assistant Director of a branch of the Citizen's Office. For purposes of our appellate review, we will assume that Córdova's testimony regarding Vázquez's job responsibilities established that she met the minimum stated requirements for the positions of Secretary III and Assistant Director (a position that was essentially renamed Executive Director II in 1997).

c. Rivera

Rivera, a member of the PDP, testified that she told Delgado "that I am a person who under no circumstances will persecute anyone because as she [Delgado] knows, I have been persecuted for more than seventeen years by the NPPers and the Populares (PDP party members) who have allowed that I be persecuted and that I would under no circumstances would [sic] allow that and if I saw anything or understood that there would be any persecution, that I would rather resign and that is what I did."

Rivera also testified about her understanding and observations of political persecution during her time at the municipality. She explained her " understanding that persecution involves leaving an employee without work," and when Rivera passed Vázquez's desk, she often observed that Vázquez had no work to do. Rivera made the same observation about one other employee. In consequence, Rivera told the municipal secretary, Dora Martínez Torres ("Martínez"), [10] to "watch out, ' because since she belongs to another party, and was not giving them any work it could be understood that it was political persecution." Rivera said that Martínez was a member of the PDP and that she began work after the new administration took office. Additionally, she explained that while at first she did not have an adverse relationship with Martínez, their working relationship later soured because of Martínez's "persecution with the employees."

[10] *Martinez is not a party in this case.*

According to Rivera, she used to have lunch with Martínez and Delgado, but "upon seeing that they though differently than the way I though, well, then I understood that it was best not to have lunch to avoid taking any decisions, well, leave my job, be a part of a persecution, and remarks that might be out of order." When pressed as to what Delgado specifically said that convinced Rivera that they should no longer lunch together, Rivera said that "[o]ne of Mrs. Delgado's remarks had to do with the process when letters were to be delivered that there would be equality - - let's say that the salaries were going to be lowered or if their permanency was going to be removed, well, then it would be the same for everyone notwithstanding the person involved." [11] Later, Rivera testified that she and Delgado had lunch together perhaps two or three times and that they did not talk about politics.

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[11] *Plaintiff's counsel asked whether the translation might be more accurate as "regardless of the pressure involved" instead of 'regardless of the person involved." The court replied that it "had no objection to that."*

Rivera was asked whether she "could tell the jury if the members of the New Progressive Party employees were targeted for this personnel action" of receiving the reassignment letters. Rivera replied: "Yes, because the employees who were given permanence in '97, well, those were the employees who would be subjected to the application of the law in which their permanence would be taken away from them." Upon prompting, Rivera said that those employees belonged to the NPP party.

d. Vázquez

Vázquez was on the stand for three days. In addition to detailing her work history and the responsibilities of her employment with the municipality, Vázquez testified that her academic preparation and experiences qualified her for all of the municipal positions that she had held. Vázquez also testified that her immediate supervisor, Martinez, both made politically discriminatory remarks, including stating that '[w]ell, hopefully they will kill all the NPPers" and failed to give her any work from January to August of 2001. on August

24, 2001, Vázquez sent a letter and an accompanying table to Martinez detailing her work assignments since January 15, 2001 (excluding one month of vacation and one month of sick leave over the seven-month period). The letter informed Martinez that of the remaining five months of that period, Vázquez performed tasks on forty-two of the 106 work days. On cross-examination, Vázquez admitted that she never informed Delgado or Santiago of her lack of work, saying that it is "not the mechanism, and that would be gossip." She further admitted that after Martínez received her letter of August 24, Vázquez was given sufficient work to occupy her work days.

Vázquez testified about the meeting on May 22 when between fifteen and eighteen employees were given their reassignment letters. She said that all of the employees at the meeting were members of the NPP who "held positions of hierarchy in the previous administration." According to Vázquez, "the Mayor began the meeting indicating that he was the person in power, that the Popular Democratic Party had

won. That they had to adopt actions with employees, that they had to clean house and that they were going to deliver letters to us in which there would be changes in our salaries or our permanence; that whomever wished to go to JASAP had 30 days to do so, that whomever wished to go through attorneys, well, they then had to bear the consequences of their actions and that we would see each other in Court."[12] Vázquez continued recounting the events of the meeting, noting that Delgado "began indicating that she was seconding what the Mayor had stated and she explained the appeals process.

Vázquez also recounted the details of what appears to be the only other time she met Santiago. When Santiago was campaigning and seeking votes, he visited the community where Vázquez lived. According to Vázquez, "[h] e came up the stairs. At that point he introduced himself as a candidate for the Popular Democratic Party and at that point I told him

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[12] *Santiago disputes that he said that they were going to "clean house." Instead, Santiago testified that at the May 22 meeting, he said that "it is my obligation [to] correct what the previous administration did wrong and that... very much in spite of what I might want to do, I had to do it morally." Of course, under the Rule*

that I belonged to the New Progressive Party, that I campaigned for the NPP from 1984. That I was a militant and that I had held assorted positions with the administration of Mayor Victor Soto and as all candidates he told me that he was counting on my vote." Plaintiff's counsel then asked Vázquez whether Santiago "was able to recognize you that you were a member of the New Progressive Party" at the May 22 meeting. Vázquez responded, "He shook hands with me and greeted me."

Vázquez also testified about her activity on behalf of the NPP. She had been an electoral college officer since the age of eighteen and president of the committee for her local ward in Toa Baja. Vázquez participated in mobilization, fundraising, organizing, and "all kinds of activities related to politics and the NPP."

2. Defendants' Uncontradicted Testimony

Before considering this testimony, we observe that a strong case could be made that defendants' motion for

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50 standard, we credit Vázquez's version of events over Santiago's

judgment as a matter of law at the close of plaintiff's case should have been granted. Of course, defendants do not make this argument on appeal. Having put on a defense at trial, they are foreclosed from doing so. See Gillentine v. McKeand, 426 F. 2d 717, 723, (1st Cir. 1970) ("defendant's motion for a directed verdict at the close of plaintiff's case expired" upon the introduction of substantial defense evidence and was not preserved for appeal). Accordingly, in evaluating defendants' appeal form the district court's denial of their motion for judgment as a matter of law after the close of all evidence, we consider both plaintiff's evidence and the uncontroverted evidence offered by defendants. Santiago-Negron, 865 F. 2d at 445.

a. Delgado

Delgado testified that at the time of transition between the two administrations, the municipality had 1,343 employees on its roster. Delgado's uncontradicted testimony also established that there was no evidence in Vázquez's personnel

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for purposes of our analysis here.

file establishing that Vázquez met the minimum requirements for appointment to Secretary III or Assistant Director, or that she served the requisite probationary period for either position.[13] Delgado testified that according to the documents in Vázquez's personnel file, Vázquez lacked the commercial or secretarial training required to be appointed to Secretary III in 1993. On cross, plaintiff's counsel drew Delgado's attention to Córdova's letter asking that Vázquez be appointed to Secretary III, which, taking the evidence in the light most favorable to the plaintiff, could establish her eligibility for the position. Upon questioning, Delgado testified that she cannot explain why that document was not contained in Vázquez's personnel file.

Delgado further testified that Vázquez's personnel file contained no indication that the Human Resources Department followed the procedures and analysis required to reclassify an

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[13] *We do not make this point to question Vazquez's qualifications for her positions. As noted in our discussion of Córdova's testimony, we have assumed that she met the stated qualifications for the positions of Secretary III and Assistant Director. We simply make the point here that anyone reviewing her personnel file would not find evidence of these qualifications in the file.*

employee, without competition for the position, based on the employees assumption of greater responsibility and obtaining further credential.

b. Santiago

In uncontradicted testimony from Santiago, he explained that he sough advice regarding the effect and legality of the 1997 plan, and that he acted on that advice. As noted, the evidentiary rulings below prevented the defense from putting before the jury the nature of the advice the defendants received.

Santiago further testified that of the municipal employees who received letter adjusting their status, "nearly half of them, their salaries have increased, others have gone down." He also testified that he retained several members of the opposing party in trust positions after he took office and that he took only one of his people into the mayor's office with him. According to Santiago, "the rest of them, I honored their position and I allowed them to remain, despite the fact that it's a high confidentiality position..."

Santiago was asked on cross-examination whether he knew the party of the employees who lost permanent status and became transitory employees by virtue of declaring the 1997 plan void. He replied that "[t]here are members of all three parties." When pressed for an estimated percentage break-down among the parties, Santiago could not provide one, but he agreed that there were more NPP members than PDP members in that group. When counsel asked whether it is "a true fact that, more or less, form 75 to 80 percent of the employees of Toa Baja are members of the New Progressive Party," Santiago agreed that "[t]hat might be." According to Santiago's uncontradicted testimony, he had not appointed anyone to a career position since he took office.

D. Topical Summary of the Evidence

On topics important to establishing a political discrimination claim, the evidence that we have reviewed through the Rule 50 lens establishes the following propositions.

1. Personnel Actions

Defendants rescinded the 1997 plan and reassigned several hundred employees, including Vázquez, in accordance with the 1991 plan. Sánchez testified that she advised Santiago to seek advice before deciding to rescind the 1997 plan. Santiago's uncontradicted testimony was that he did indeed seek such advice. As we have described, the nature of that advice was kept form the jury at trial.

Sánchez testified that the people whom she knew who were affected by the reclassification plan were NPP members. Rivera also testified that affected employees belonged to the NPP. However, the kind of personnel review undertaken by defendants necessarily would impact more NPP members because of the long dominance of the NPP over municipal affairs. Indeed, Santiago agreed with plaintiff's counsel that approximately seventy-five to eighty percent of the employees of Toa Baja are members of the NPP, and Rivera herself explained, 'because the employees who were given permanence in '97 [when the NPP had been in control of the city government for over twenty years], well, those were the

employees who would be subjected to the application of the law in which their permanence would be taken away form them."

Santiago's uncontradicted testimony was that nearly half of the employees affected by the personnel changes actually received higher salaries. Plaintiff neither rebutted this testimony nor offered any evidence that there was a disparity – by political affiliation or otherwise – between those who received higher salaries and those who received lower salaries under the new reclassifications.[14]

2. Treatment of Vázquez

Vázquez lacked sufficient work to occupy her time from January through August 2001 (less the two months when she was on leave). When Vázquez sent a letter to her immediate supervisor, Martinez, detailing her lack of work projects during this time, Martinez began assigning Vázquez

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[14] *As we recently explained in Sanchez-Lopez, while "there is simply not a claim of 'disparate impact' available under this First Amendment doctrine" of political retaliation, evidence that "all of the employees affected by defendants' actions were NPP members" might be considered evidence that defendants harbored discriminatory animus. Sanchez-Lopez, 375 F. 3d at 140.*

adequate work. Additionally, Vázquez was demoted from Executive Director II to Office Worker/Typist I effective February 1, 2002. A hearing officer found that the reassignment was valid because Vázquez previously had been illegally hired and promoted.

Sánchez and Córdova testified that Vázquez met the minimum qualifications for each of the positions to which she had been appointed. However, Sánchez admitted that the municipality generally did not follow the procedural requirements for personnel actions. Plaintiff never offered any clear evidence or testimony that her appointments either met these procedural requirements or were eligible for an exception to any of the requirements. In fact, Vázquez admitted that she was promoted without going through the regular competitive process or serving the normally required probationary period. Furthermore, Delgado's uncontradicted testimony was that there was no material in Vázquez's personnel file to show either that the procedural requirements were followed or that

Vázquez's appointments were eligible for an exception to the usual procedural requirements.

Taking the evidence in the light most favorable to the plaintiff, Vázquez arguably established that she did not need to comply with the normal appointment procedures when she assumed the position of Executive Director II because that position was simply a reclassification of the position of Assistant Director. However, Vázquez's demotion to Office Worker/Typist I was premised on the alleged illegality of her appointment to Secretary III, not on any ineligibility to be reassigned form Assistant Director to Executive Director II.

3. Statements of Discriminatory Intent

At the May 22 meeting, where fifteen to eighteen NPP employees received letters adjusting their positions within the municipality, the Mayor stated that the "Popular Democratic Party had won. That they had to adopt actions with employees, that they had to clean house and that they were going to deliver letters to us in which there would be changes in our salaries or

our permanence.... [15] Plaintiff presented evidence of one other statement evincing discriminatory intent or animus: Martinez, plaintiff's direct supervisor and a non-party in this case, said at a gathering something like "[w]ell, hopefully they will kill all the NPPers."

4. Rivera's Perception of Political Retaliation

Rivera, a member of the PDP, offered what is best characterized as lay opinion testimony: she thought political retaliation was occurring in her department under Martinez, based on her observation that Vázquez and one other employee were not fully occupied with work, at least for some period of time. Rivera testified that "if I say anything or understood that there would be any persecution, that I would rather resign and that is what I did." Additionally, Rivera said at one point that after having lunch with Delgado and Martinez, she saw "that they thought differently than the way I thought.' There is also an ambiguous reference to "remarks that might be out of order"

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[15] *Again, we note that although this evidence is contradicted by Santiago's testimony, we take it as true for purposes of the Rule 50 analysis.*

in Rivera's testimony. Rivera also testified that her relationship with Martinez soured over Rivera's perception of political persecution in the workplace.

However, Rivera also testified that she and Delgado did not talk about politics, and that the only political comment Delgado made to her was one that "had to do with the process when letters were to be delivered that there would be equality– let's say that the salaries were going to be lowered or if their permanency was going to be removed, well, then it would be the same for everyone notwithstanding the person [or regardless of the pressure] involved." This testimony by plaintiff's own witnesses establishes that Delgado indicated that the reclassifications would be done with "equality" and that changes inn permanence or salaries would be implemented regardless of the people affected 9or the pressure involved). This testimony – elicited by plaintiff's counsel during her case-in-chief – supports defendants' claims that they implemented the reclassifications in a neutral manner.

E. Analysis of the Evidence

This evidence is not sufficient to show that plaintiff's political affiliation was a substantial or motivating factor in defendants' decision to reclassify her under the 1991 plan. In fact, the evidence presented at trial does not create a reasonable inference that defendants were even aware of Vázquez's political affiliation at the time her personnel file was reviewed and she was reassigned according to the 1991 plan. We encountered a factually similar situation in Gonzáles-De Blasini v. Family Dept., 377 F. 3d 81 (1st Cir. 2004). There, we affirmed dismissal of a plaintiff's political discrimination claim because plaintiff

> adduced no evidence that the defendants knew she was a member of the NPP. She attempts to bolster her political discrimination cause of action by alleging that [defendants] must have been aware of her political affiliation because she was a well-known supporter of the NPP in the community, had held a previous trust position under the NPP administration, and was allegedly demoted shortly after the PDP assumed power. [Plaintiff] points to [defendant's] statement that she wanted [plaintiff's] office and position to go to an employee of her trust as indication of a causal link between her political beliefs and the change in her employment conditions.

Id. At 85-86. In González-De Blasini, we held that such evidence was "insufficient to show that political affiliation was a substantial factor in the challenged employment action." Id. At 86.

Vázquez has shown no more here. The fact that Santiago met Vázquez during routine campaign canvassing, and that Vázquez then identified herself as a ember of the NPP and an employee of Mayor Soto's, does not lead to a reasonable inference that Santiago or Delgado knew that she was a member of the NPP when they conducted their review of all personnel files for irregularities or when they met with her on May 22 as part of a group. Nor does Vázquez's testimony about her NPP activities or positions held under the previous administration support such an inference. Toa Baja is a city with almost 100,000 residents, and the city employed approximately 1,300 people. While Vázquez did occupy a trust position for about twenty months under Mayor Soto, she provided no evidence that her

trust position was of such a high nature that defendants necessarily would have known who she was and her party affiliation. In fact, when asked on direct examination whether Santiago recognized her as an NPP member at the May 22 meeting, five or six months after Santiago introduced himself while campaigning, Vázquez did not answer in the affirmative. Instead, she stated only that "[h]e shook hands with me and greeted me."

Even if a jury could reasonably infer that defendants knew that plaintiff was a member of the NPP, that still is insufficient. Proving that her political affiliation was a substantial or motivating factor in the adverse decision requires more than "[m]erely juxtaposing a protected characteristic—someone else's politics—with the fact that the plaintiff was treated unfairly." Correa-Martinez v. Arrillaga-Beléndez, 903 F. 2d 49, 58 (1st Cir. 1990). Indeed, the evidence falls short of even showing that Vázquez was treated

"unfairly." Regardless of whether she met the minimum educational and experiential qualifications, a disputed point on which we take Vázquez's version of events, the undisputed testimony establishes that Vázquez did not meet the statutory procedural requirements – such as applying for and being interviewed for an advertised job in competition with other candidates, or serving the required probationary period – for the Secretary III and Assistant Director appointments. Plaintiff's own witness, Sánchez, testified that the municipality simply did not hire personnel in accordance with these various provisions.

The mayor's alleged comment about "cleaning house" also is not sufficient to sustain plaintiff's burden. In Figueroa-Serrano, a plaintiff testified that the mayor said that "he was going to clean City Hall of most NPP employees..." Figueroa-Serrano, 221 F. 3d

at 4.[16] In granting defendants' summary judgment motion, we observed that the plaintiffs relied on "generalized assertions of the defendants' affiliation with the rival political party; and the enactment of a personnel policy change after the elections. Id. We then characterized this evidence as a "meager showing" and held that it was 'patently insufficient to generate a genuine issue of material fact on a causal connection between the political affiliation of the plaintiffs and the adverse employment actions alleged." Id.

Plaintiff has done no better here. Indeed, Vázquez's testimony regarding Santiago's "cleaning house" comment is even less forceful than the plaintiff's testimony in Figueroa-Serrano. There, the mayor allegedly said specifically that he intended to get rid of NPP members. Here, Vázquez did not even

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[16] *In Figueroa-Serrano, we found that plaintiffs failed to proffer sufficient evidence of political discrimination to defeat a summary judgment motion. Because the "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the 'inquiry under each is the same,' " Reeves v. Sanderson*

allege that kind of direct statement from Santiago. In contrast to Vázquez's case, we have upheld a district court's denial of motion for a judgment notwithstanding the verdict when the plaintiffs presented "ample evidence that [the defendant mayor] (1) knew plaintiffs were affiliated with NPP, (2) gave instructions to 'chop off the heads of the NPP members, ' and (4) told municipal employees to switch to the PDP." Hiraldo-Cancel v. Aponte, 925 F. 2d 10, 12 (1st Cir. 1991). Vázqeuz has produced no comparable evidence here.

Importantly, Vázquez also offered no evidence that PDP members were hired to replace the reassigned NPP members. In fact, Santiago's uncontradicted testimony was that he had not appointed anyone to a career position since he took office. Vázquez also offered no evidence that the reassignments were effectuated in a discriminatory of differential manner, or that they were targeted at NPP employees.

Plumbing Prod. Inc., 530 U.S. 133, 150 (2000) 9citation omitted), we

Plaintiff's own witness, Rivera, stated that Delgado told her that if the result of reassigning people according to the 1991 plan was that it would be done with "equality" and if 'the salaries were going to be lowered or if their permanency was going to be removed, well, then it would be the same for everyone notwithstanding the person [or regardless of the pressure] involved." The defendants presented uncontradicted testimony that they were reviewing every personnel file in the municipality and that members of all parties were affected by the reassignments. These facts distinguish this case from the scenario presented in Acevedo-Garcia v. Monroig, 351 F. 3d 547 (1st Cir. 2003). There, "[p]laintiffs... produced evidence supporting their theory that the termination plan was implemented in a way designed to target members of the NPP while sparing most members of the PDP. Further, the jury heard evidence that the vast majority of people hired

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find our reasoning in Figueroa-Serrano instructive here.

with extra –municipal funds belonged to the PDP." Id. at 565.66. Vázquez has made no such showing.

At first blush, the actions and statements by Martinez, Vázquez's supervisor, are troublesome. Martinez failed to provide adequate work to keep Vázquez occupied for five months, and Martinez also allegedly stated that "[w]ell, hopefully they will kill all the NPPers." However, Vázquez makes no showing as to why defendants should be held liable for Martinez's actions.[17] Vázquez admitted that she informed neither Delgado nor Santiago about her lack of work, and she admitted that Martinez gave her sufficient work after Vázquez's memo of August 24, 2001. Vázquez offered no evidence that Martinez's actions reflected a municipal "custom or practice [that] is so well settled and widespread that the policy-making officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the

practice." Silva v. Worden, 130 F. 3d 26, 31 (1st Cir. 1997) (quotations and citations omitted) (cited in Acevedo-Garcia v. Monroig, 30 F. Supp. 2d 141, 152 (D. P.R. 1998). Unlike in Acevedo-Garcia, where discriminating supervisors "claimed to be acting on the orders of 'higher up' officials within the Municipality, including [the defendants]," id., Vázquez has produced no such evidence here. Furthermore, Martinez's alleged comment is akin to the kind of isolated stray remark by a nondecisionmaker that we have held has limited probative value in other contexts. See, e.g., Gonzalez v. El Día, Inc., 304 F. 3d 63 91st Cir. 2002) (explaining that in the context of an age discrimination claim, "'stray workplace remarks,' as well as statements made either by nondecisionmakers or by decisionmakers not involved in the decisional process, normally are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus").

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[17] *For purposes of our analysis here, we will assume that Martinez's*

While Martinez was the decisionmaker regarding Vázquez's workload, plaintiff offered no testimony that Martínez was involved in any way in the decision to rescind the 1997 plan as null and void or in the review of Vázquez's personnel file and reassignment.

The plaintiff presented no evidence that Santiago or Delgado created an atmosphere of discrimination or a policy of leaving NPP employees without work, and she made no claim that Martinez was implementing any such policy during the months that Vázquez had insufficient work. In fact, plaintiff's witness Rivera testified that the fourteen NPP employees she supervised were always provided with adequate work. In sum, whatever problems Vázquez may have had with her immediate supervisor, Vázquez presented no evidence that any comment or action by Martinez is fairly attributable to the defendants in this case, and, on these facts, Martinez's statement is not

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actions actually amount to political retaliation.

probative of whether defendants acted with discriminatory animus.

In short, plaintiff failed to show that her political affiliation was a substantial or motivating factor in her demotion or alleged constructive discharge. Although plaintiff's allegations of "political discrimination can be built on circumstantial evidence of constitutionally suspect motivations" for the adverse employment action, Vázquez has offered only a mere scintilla of evidence of political discrimination. Her evidence does not amount to "the specific facts necessary to take the asserted claim out of the realm of speculative, general allegations." Kauffman v. P.R. Tel. Co., 841 F. 2d 1169, 1173 n. 5 (1st Cir. 1988)

III.

We do not set aside jury verdicts lightly. Nevertheless, when plaintiff fails to adduce sufficient evidence for a jury to reasonably infer that plaintiff's political affiliation was a substantial or motivating factor in an adverse employment

action, we must do so. For the forgoing reasons, we vacate the judgment and order the entry of judgment for defendants. The parties shall bear their own costs.

So ordered.

United States Court of Appeals
For the First Circuit

No. 03-1949

DIANA VAZQUEZ-VALENTIN
Plaintiff – Appellee

v.

VICTOR J. SANTIAGO-DIAZ, In his personal capacity and as mayor of Toa Baja; MUNICIPALITY OF TOA BAJA; MILAGORS DELGADO-ORTIZ, In her personal capacity and as Human Resources Director of the Municipality of Toa Baja
Defendants – Appellants

Before,
Boudin, Chief Judge,
Torruella, Selya, Lynch, lipez and Howard, Circuit Judges

ORDER OF COURT

Entered: November 17, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court in banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

Richard Cushing Donovan, Clerk

[cc: Jesus M. Hernandez Sanchez, Esq., Guillermo A. Macari-Grillo, Esq., Roberto A. Fernandez-Quiles, Esq., Kenneth Colon-Alicea, Esq., Carlos A. Del Valle Cruz, Esq.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DIANA VAZQUEZ VALENTIN, et al., Plaintiffs vs. VICTOR J. SANTIAGO DIAZ, et al., Defendants	Civil No. 01-1788 (JP)

FINAL JUDGMENT

_____ Pursuant to the Judgment of the First Circuit Court of Appeals entered on September 22, 2004 **(docket No. 113)** and the Mandate [18] of said Court **(docket No. 114)**, the Court hereby **ENTERS JUDGMENT** for Defendants.

This judgment is entered without the imposition of costs.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 27th day of January, 2005.

S/Jaime Pieras, Jr.
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT COURT

[1] *"This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated, and the district court is ordered to enter judgment for the defendants. The parties shall bear their own costs."*

(2)

No. 04-1322

Supreme Court, U.S.
FILED
JUL 27 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DIANA VAZQUEZ-VALENTIN,

Petitioner,

v.

VÍCTOR J. SANTIAGO-DIAZ, Individually and as Mayor of Toa Baja, Puerto Rico, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the First Circuit Court of Appeals' entry of judgment as a matter of law in favor of respondents was in contravention of this Court's decision in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), and subsequent decisions of this Honorable Court interpreting Fed. R. Civ. P. 50(b), given that Defendants did not renew their motion for entry of judgment as a matter of law after the jury had rendered a verdict in favor of petitioners.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioner accurately lists the parties to the proceedings. No disclosure need be provided under Rule 29.6, because all of the parties are individual citizens.

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BRIEF IN OPPOSITION

Respondents Victor J. Santiago-Díaz, the former Mayor of Toa Baja, Puerto Rico, and Milagros Delgado-Ortiz, the Human Resources Director of the Municipality of Toa Baja, hereby oppose the petition for writ of *certiorari*, which seeks review of the First Circuit Court's decision of September 22, 2004 and Order denying petition for rehearing and suggestion for rehearing en banc entered November 17, 2004.

COUNTER-STATEMENT OF THE CASE

A. Introduction

Further review of the **First** Circuit's decision in this case is unwarranted. First, Petitioner has failed to set forth compelling reasons in order for this Court to exercise its judicial discretion and review on a writ of *certiorari* pursuant to Rule 10 of the Supreme Court of the United States. **Second**, at least one other Court of Appeals have adopted the same rule underlying the precedent followed by the Court of Appeals for the First Circuit in this case, pursuant to which it retains the authority to assess the sufficiency of the evidence even when a party has failed to make a proper motion below with the intention of preventing "manifest injustice" in cases where the record reflects absolute dearth of evidence to support the jury's verdict.[1] **Third**, Petitioners waived their waiver argument, by failing to contend on appeal that Defendants had forfeited

[1] *Udemba v. Nicoli*, 237 F.3d 8, 13 (1st Cir. 2001) (quoting *Faigin v. Kelly*, 184 F.3d 67, 76 (1st Cir. 1999)); *see also Pachuta v. Massey-Ferguson, Inc.*, 170 F.3d 125 (2nd Cir. 1999).

their sufficiency of the evidence issue by failing to renew their motion for judgment as a matter of law after the verdict. **Fourth**, and finally, the Rule 50(b) procedures should be equitably modified, because the District Court's issuance of its May 14, 2002 *Opinion and Order* effectively constituted a premature denial of Defendants' Rule 50(b) motion, rendering their arguments with respect to a judgment as a matter of law effectively moot, and making it futile to file such a motion.

B. Background

Respondents were defendants in this political discrimination case. During the trial, they twice moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (a), once after the plaintiff-petitioner had rested her case, and again after they had rested. Both motions were denied, and the case went to the jury, which returned a verdict for the plaintiff on May 14, 2002. On that same day, judgment was entered for the plaintiff, whereupon the defendants stated to the District Court that they intended to file a Rule 50(b) motion within the ten-day time limit.

Two days later, on May 16, 2002, the defendants were given notice that on the same day that they had informed that they were going to file their Rule 50(b) motion, the District Court had signed an *Opinion and Order* denying defendants' motion for qualified immunity. (Docket No. 76). In its order, the court ruled that, because the jury found for the plaintiff and awarded her punitive damages, this necessarily implied that the jury found defendants Victor Santiago and Milagros Delgado to have been "motivated by evil motive or intent, or [that their conduct] involved a reckless or callous indifference to Plaintiff's

federally protected rights." The court thus determined that the individual defendants were not, as a matter of law, entitled to qualified immunity and, consequently, that the punitive damages award was warranted. (Docket No. 76, Conclusions of Law Nos. 4 and 5).

The issuance of the *Opinion and Order* in such a short period of time after the verdict took defendants by surprise. The court's unreserved acceptance of the jury's verdict, and its reliance on the same to sustain the denial of qualified immunity and the award of punitive damages before the defendants had even had the opportunity to present their arguments in support of their Rule 50(b) motion, was taken as a premature denial of defendants' arguments for judgment as a matter of law. Defendants considered that the *Opinion and Order* effectively foreclosed any possibility of consideration of a Rule 50(b) motion, and, considering it futile to file, elected not to do so.

Defendants did, however, file a Rule 59 motion requesting the court to set aside the compensatory and punitive damages awards. (Docket No. 84). The plaintiff filed an opposition in which, significantly, she contended that defendants' motion was in reality a motion requesting judgment as a matter of law. (Docket No. 85).[2] Indeed, in her opposition, the plaintiff fully argued in favor of the sufficiency of the evidence to support the jury verdict for, both, compensatory and punitive damages. (Docket No. 85). She also filed a Motion for Reinstatement of Plaintiff

[2] The District Court acknowledged the fact that Plaintiff viewed Defendants' Rule 59 Motion as a motion for judgment notwithstanding the verdict. (Docket No. 99, Pt. III – Plaintiff's Arguments, *Opinion and Order* of May 5, 2003).

to her position of Executive Director II (Docket Nos. 80, 87), and Defendants timely opposed to the same (Docket Nos. 82 and 88). Roughly one year later, on May 5, 2003, the District Court issued an *Opinion and Order* denying Defendants' Rule 59 motion, as well as granting Plaintiff's motion for reinstatement. (Docket No. 99).

On June 3, 2003, Defendants filed their Notice of Appeal. (Docket No. 107). In their brief, Defendants-Appellants argued, first, whether Plaintiff's evidence of political discrimination was insufficient to establish a prima facie case of political discrimination; second, whether the district court erred by excluding certain documentary evidence that was crucial to Defendants' defense; third, whether the trial judge's prejudicial remarks and conduct before the jury tainted the verdict to the point of warranting a new trial; fourth, whether the District Court abused its discretion by ordering the reinstatement of Plaintiff; and fifth, whether the District Court erred in denying the Defendants' qualified immunity defense.

On September 22, 2004, the United States Court of Appeals for the First Circuit issued an opinion in which it invoked its authority to assess the sufficiency of the evidence in the present case on appeal pursuant to *Udemba v. Nicoli*, 237 F.3d 8, 13 (1st Cir. 2001), and ruled that Plaintiff had failed "to adduce sufficient evidence for a jury to reasonably infer that Plaintiff's political affiliation was a substantial or motivating factor in an adverse employment action, [thus vacating the judgment and ordering] the entry of judgment for defendants." *See Vázquez-Valentín v. Santiago-Díaz*, 385 F.3d 23, 40 (1st Cir. 2004). Plaintiff-Appellee filed a Petition for Rehearing and Suggestion for Rehearing en banc, which the Court of

Appeals denied on November 17, 2004.[3] Plaintiff then filed her present petition.

C. Deficiencies in Petitioner's Statement of Facts

In her statement of the facts of the case, Plaintiff fails to disclose in full detail the procedural aspects that distinguish this case from *Cone* and its progeny. The argument presented in relation to those procedural facts will demonstrate that this Honorable Court should deny her petition.

1. In the Statement of the Case and description of the ruling of the Court of Appeals, the Petitioner fails to fully disclose and clarify the precise bases for the Court of Appeals authority to asses the sufficiency of the evidence. Above and beyond its citation to precedents such as *Udemba* in order to assess the sufficiency of the evidence, the Court of Appeals took into consideration the fact that "plaintiff has failed to allege defendants' forfeiture of the sufficiency of the evidence issue." *Vázquez-Valentín*, 385 F.3d at 29 n.8 (1st Cir. 2004). Nowhere in her brief to the Court of Appeals did she mention that Defendants had failed to renew their motion for judgment as a matter of law after the jury verdict, therefore failing to preserve that argument in the last court prior to Supreme Court review. During her oral argument before the First Circuit, moreover, Petitioner again failed to make any reference to the issue of the Defendants' failure to file a renewed post-verdict motion for judgment as a matter of law. Plaintiff waived waiver.

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[3] *See* Appendix B of Petition for Writ of *Certiorari*.

2. Defendants filed a Rule 50 motion for judgment as a matter of law at the close of Plaintiff's case and at the close of all the evidence before submitting this case to the jury. Plaintiff thus did have prior notice of the fact that Defendants were challenging the sufficiency of the evidence.

3. Plaintiff viewed Defendants' Rule 59 Motion (Docket No. 84) as a motion notwithstanding the verdict. (Docket No. 99, Part III – Plaintiff's Argument, in Opinion and Order of May 5, 2003; *see also* Docket No. 85, Plaintiff's Opposition to Defendants Rule 59 Motion). Plaintiff was aware of Defendants' challenge as to the sufficiency of the evidence, given that in her opposition to the Rule 59 motion (Docket No. 85 , she fully argued in favor of the sufficiency of the evidence to support the jury verdict as to both compensatory and punitive damages. Consequently, Petitioner was on notice and forewarned as to the fact that Defendants were challenging the sufficiency of the evidence in the District Court.

REASONS FOR DENYING THE WRIT

I. Petitioner's Claim Is Unworthy of Review by this Honorable Court.

Petitioner asserts that this Honorable Court's decision in *Cone* and its progeny precluded the Court of Appeals for the First Circuit from reviewing the sufficiency of the evidence and ordering in this case that judgment be entered for the defendants after vacating a jury verdict for plaintiff. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967); *Johnson v. New York, N.H. & H. R.R.*

Co., 344 U.S. 48 (1952); *Fountain v. Filson*, 336 U.S. 681 (1949); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948). Those cases hold that, in the absence of a motion for judgment as a matter of law made in the trial court within ten days after the entry of judgment, Rule 50(b) normally forbids an appellate court to enter such a judgment. Petitioner's statement of the facts in this case is such that, on first impression, the reader is bound to instinctively conclude that the First Circuit Court of Appeals committed such error. As argued below, the procedural facts of this case allow us to distinguish it in such a manner as to make the general rule inapplicable and the case unworthy of review by this Honorable Court. Moreover, Plaintiff-Petitioner waived her waiver argument, because she failed to raise it or even mention it on appeal. Finally, in any case, the petition fails to present this Honorable Court with a compelling conflict between decisions of the Circuit Courts or a compelling federal question of any nature. Rather, petitioner's asserted error involves, at most, an alleged misapplication of a well-established rule of law, a run-of-the-mill issue for which a petition for a *writ* of *certiorari* should not be granted.

A. Considerations Governing Review on *Certiorari*

The reason set forth by Plaintiff for granting the Petition for writ of *certiorari* is that "the Court of Appeals for the First Circuit, contrary to decisions of this Court, reviewed the sufficiency of the evidence in the absence of a post verdict Rule 50(b) motion, thus ignoring this Honorable Court's precedent in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)."

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

Nowhere in the petition for writ of certiorari does the petitioner address the factors enumerated by Rule 10 of this Honorable Court. At most, Petitioner has only asserted an error consistent with an "erroneous factual finding or **the misapplication of a properly stated rule of law**" pursuant to Rule 10 of this Court. In the latter instances, a petition for writ of *certiorari* is rarely granted. *See id.* The above-discussed issue is of such minor importance in the overall structure of the law that resolution by the highest Court is unnecessary.

Respondents contend that the instant petition should be denied because the decision below gave full consideration to the issues and decided them correctly; the issues raised by petitioner are not sufficiently important to warrant this Court's attention or, in other words, the issue raised lacks overall national importance; the allegedly conflicting decisions relied upon by petitioner are distinguishable on their facts the allegedly conflicting decisions relied upon by petitioner are distinguishable on the law; the questions presented by petitioner were not raised or preserved, and thus, were waived below; and, last but not least, the petition is void of a federal question of substance.

B. The Procedural Facts of this Case Distinguish it from *Cone* in such a Manner as to Make the Case Unworthy of Review by this Honorable Court.

Upon deciding in *Cone* that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within the term established by the rules, Rule 50(b) forbids an appellate court to enter such a judgment, this Court was acting on the basis of principles of fairness and had in mind practical considerations.[4] *See Johnson*, 344 U.S. at 53 (citing *Cone*, 330 U.S. at 217-18).

In *Cone*, this Court noted that Rule 50(b) provided alternatives to a trial court confronted with such a motion, because it did not contain any kind of language that absolutely required a trial court to enter judgment notwithstanding the verdict even though that court was persuaded that it had erred in failing to direct a verdict for the losing party. Rather, the rule provided the trial court with the alternative to determine, in meritorious circumstances, that the ends of justice would be better served by ordering a new trial. *See Cone*, 330 U.S. at 216. Through its subsequent opinions on this matter, this Court has sought to protect litigants from having their right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. *Cone*, 330 U.S. at 217. The present case is distinguishable for the following reasons.

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[4] The purpose of the renewed motion under Rule 50(b) is "to give the opposing party an opportunity to cure the defects in proof that might otherwise preclude him [or her] from taking the case to the jury." *Pachuta v. Massey-Ferguson*, 170 F.3d 125, 129 (2nd Cir. 1999) (citations omitted).

i. The Purpose of Rule 50(b) Was Served.

In the case presented for this Honorable Court's consideration, Defendants' failure to file a post-judgment Rule 50(b) motion did not preclude Plaintiff from arguing fully in defense of the verdict in her favor, or the trial court from passing judgment on the question. As discussed above, Defendants filed two motions for judgment as a matter of law under Rule 50(a), once at the close of Plaintiff's case, and again at the close of all the evidence, before the case was submitted to the jury. Furthermore, Plaintiff herself viewed Defendants' Rule 59 Motion as a motion notwithstanding the verdict. (Docket No. 99; *see also* Docket No. 85). Accordingly, Plaintiff was well-aware that Defendants were challenging the sufficiency of the evidence. Strict compliance with Rule 50(b) is not necessary when the purposes of the Rule have been served.[5] The court and Plaintiff were alerted as to the insufficiency of the evidence issue brought by Defendants.

As such, the objective of this Court's decisions in *Cone* was not undermined by the Court of Appeals' order that judgment be vacated for the plaintiff and entered for the defendants. As the District Court itself explained in its May 5, 2003 *Opinion and Order* (Docket No. 99), in her opposition to Defendants' Rule 59 motion requesting that the court set aside compensatory and punitive damages, Plaintiff had the opportunity to defend the sufficiency of the evidence and the lack of any argument in support of granting a new trial.

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[5] *See generally* 9A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2535.

ii. The Court of Appeals Was Authorized to Assess the Sufficiency of the Evidence.

Normally, "[t]o preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict." *Varda v. Insurance Company of North America*, 45 F.3d 634, 638 (2nd Cir. 1995) (citing *Johnson*, 344 U.S. at 50, and *Cone*, 330 U.S. at 214-18, among others). "In the absence of a Rule 50(b) renewed motion *or extraordinary circumstances*, an appeal court is without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Pachuta*, 170 F.3d at 129 (emphasis added).

Extraordinary circumstances are present, however, where the failure to comply with the requirement that a post-judgment Rule 50(b) motion be filed should be overlooked "in order to prevent manifest injustice in cases where a jury's verdict is wholly without legal support." *Pachuta*, 170 F.3d at 129; *see also Varda*, 45 F.3d at 638. In those circumstances, however, the party challenging the sufficiency of the evidence on appeal may only seek a new trial, instead of a judgment in its favor. *Johnson*, 344 U.S. at 54; *see also Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 270 (5th Cir. 1998).

The Court of Appeals for the First Circuit has stated that "failure to comply with the strictures of Rule 50, our review is limited to whether the record reflects an absolute dearth of evidentiary support for the jury's verdict. . . . The district court will only be reversed when its ruling is obviously insupportable." *Zachar v. Lee*, 363 F.3d 70, 74 (1st Cir. 2004) (citing *Udemba*, 237 F.3d at 13-14).

Hence, the Court of Appeals for the First Circuit duly invoked his authority to assess the sufficiency of the evidence in the instant case. The only question is whether it was entitled to enter judgment in Defendants' favor, or whether it was limited to ordering a new trial. As discussed below, we argue that the Court of Appeals was entitled to enter judgment.

iii. Petitioner Has Waived Her Rule 50(b) Argument.

Petitioner waived waiver. She failed to raise before the Court of Appeals the issue of Defendants' failure to file a Rule 50(b) motion. Even though making a renewed motion for judgment as a matter of law is mandatory, it is not jurisdictional, and therefore "it can be waived, and, absent a request by appellee, the court of appeals has no duty to enforce the *Varda* requirement." *Norton v. Sam's Club*, 145 F.3d 114, 118 (2nd Cir.), *cert. denied*, 525 U.S. 1001 (1998) (citations omitted). The Second Circuit added that "since appellee had waived his challenge, we need not decide whether that would be appropriate in the case before us. . . . However, manifest injustice has been found where a plaintiff failed to prove one of the four essential elements of her claim." *Id.* at 638 (citations omitted). After all, "an argument not raised on appeal is deemed abandoned." *United States v. Quiroz*, 22 F.3d 489, 490-91 (2nd Cir. 1994).[6]

[6] *See also Anchor Fish Corp. v. Torry Harris, Inc.*, 135 F.3d 856 (2nd. Cir. 1998) (noting that appellees' failure to raise non-preservation defense could constitute waiver of that defense).

In this case, and as noted by the Court of Appeals for the First Circuit, "plaintiff has failed to allege defendants' forfeiture of the sufficiency of the evidence issue." *See Vázquez-Valentín v. Santiago-Díaz*, 385 F.3d at 29 n.8. Thus, Petitioner has waived her challenge and her argument is deemed abandoned. The Court of Appeals for the First Circuit decided the issue correctly.

C. The May 14, 2002 District Court's Opinion and Order Constituted a Premature Denial of Defendants' Argument in Support of their Rule 50(b) motion.

The District Court's issuance of its May 14, 2002 *Opinion and Order,* on the same day that the Jury returned a verdict in favor of Plaintiff and before defendants had the opportunity to file their Rule 50(b) motion for judgment as a matter of law, effectively constituted a premature denial of Defendants' arguments in support of their Rule 50(b) motion. Defendants' arguments with respect to a judgment as a matter of law effectively became moot, because the District Court's order relied on the validity of the jury's verdict. Under such circumstances, the Court of Appeals would have been justified in equitably modifying the procedures established by Rule 50(b), so as to shield Defendants from the unfairness that would have resulted from a mechanical application of those procedures.

II. This Honorable Court Should Not Reverse the Appellate Court's Decision.

If this Court were to consider issuing the writ of *certiorari*, we respectfully suggest that the writ should not

extend to other arguments not related to the sufficiency of the evidence and raised on appeal by Appellants, given that they were not reached by the Court of Appeals for the First Circuit because of the disposition of the sufficiency of the evidence argument.[7]

Moreover, even if this Honorable Court were to find Petitioner's argument to be correct, Respondents respectfully request that this Court vacate and remand (not reverse) with instructions to the appellate court, inasmuch as the aforementioned court did not have a chance to consider the other arguments raised on appeal by Appellants.

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[7] Defendants raised several arguments on appeal. Among them, first, the issue of the sufficiency of the evidence and the District Court's error in denying the Rule 50 motion; second, the district court's error in denying the admissibility of certain documents crucial for Defendants' defense; third, the presiding judge's allegedly prejudicial remarks in front of the jury; fourth, the district court ruling ordering plaintiff's reinstatement to her previous position; and, fifth, the denial of the qualified immunity defense; *see Vázquez-Valentín*, 385 F.3d at 29; *see also* Appendix A of Petition for Writ of *Certiorari*, at 15a-16a.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted.

In San Juan, Puerto Rico, this 27th day of July 2005.

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